



The Comptroller General
of the United States

Washington, D.C. 20548

Speight

Decision

Matter of: Soil Conservation Service--Termination of
Collection Action

File: B-234166

Date: August 14, 1989

DIGEST

The Department of Agriculture, Soil Conservation Service, may not terminate collection of a debt arising from underpayment of the Department's proportionate share of a settlement payment made to a grant recipient by its contractor's surety company. Under the Federal Claims Collection Standards, collection action may be terminated if there is no legal basis for recovery by the United States. Because the Department of Agriculture has a significant basis for recovery, it must proceed with collection action.

DECISION

The Department of Agriculture, Soil Conservation Service (SCS), has submitted a claim against the Batavia Kill Watershed District (District) for resolution and instructions under 4 C.F.R. § 105.1(c) prior to referral by SCS to the U.S. Department of Justice. As will be explained below, there exists no law or regulation which would authorize SCS to terminate collection action and, therefore, the debt should be collected.

BACKGROUND

According to the submission, in 1973, under a watershed workplan agreement and a project agreement, the District contracted for construction of a multipurpose structure. The federal cost share of the structure was 96.12 percent. The contractor failed to diligently pursue the work and the District terminated its right to proceed. The contractor's surety refused to take over the contract and, consequently, the District reprocurd the work at an additional cost of \$574,678.27, with the federal government paying 96.12 percent (\$552,380). After protracted litigation between the District and the surety, the surety paid the District \$600,000 in settlement of the District's claim. Out of this amount, the District paid \$110,000 as legal fees to the attorney who represented it in the court actions against the

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surety. The SCS received 96.12 percent of the remainder of the settlement (\$470,988).

SCS claims that under the terms of the 1973 project agreement it should have received 96.12 percent of the gross settlement amount of \$600,000, or \$576,720. The difference in the amount that SCS actually received and the amount that SCS claims it should have received under the terms of the project agreement, \$105,732, is the amount SCS is trying to collect from the District.

According to SCS, the following provision of the project agreement entered into by SCS and the District provides the legal basis for recovery of the debt:

In the event of default, any additional funds required to assure completion of the job will be provided in the same ratio as construction funds are contributed by the parties under the terms of this agreement; and any excess costs collected from the defaulting contractor, or his surety, will be prorated between the Contracting Local Organization and the Service in the same ratio as construction funds are contributed under the terms of the agreement. (Emphasis added).

In another provision, which reads in part as follows, the District agreed to be responsible for lawsuits involving the construction contract:

"(The Contracting Local Organization) will take necessary legal action, including bringing suit, to collect from the contractor any monies due in connection with the contract . . ."

SCS has submitted this case for determination as to whether it may terminate collection action. For the following reasons we find no legal basis to terminate collection.

DISCUSSION

Collection Criteria

Under 31 U.S.C. § 3711(a)(1) (1982), the head of an executive agency generally is required to collect a claim of the United States Government for money arising out of activities of the agency. In so doing, the agency head must follow certain standards promulgated jointly by the Attorney General and the Comptroller General. 31 U.S.C. § 3711(e)(2). These standards are set out in 4 C.F.R. §§ 101.1-105 (1988).

Under the standards, neither the head of an agency nor the General Accounting Office has the authority to terminate collection action with respect to a debt owed to the agency if the amount involved exceeds \$20,000. Such authority is solely within the discretion of the Department of Justice.^{1/} See 31 U.S.C. § 3711(a)(3)(b), as implemented by 4 C.F.R. § 104.1(b). However, this matter is properly before us because there is doubt as to the merits of suspending or terminating collection. See 4 C.F.R. § 105.1(c).

Under the Claims Collection Standards, collection action may be suspended or terminated for any of the following reasons: (1) inability to collect any substantial amounts; (2) inability to locate the debtor; (3) the cost of collection will exceed the amount of recovery; (4) the government's claim is legally without merit; and (5) the government's claim cannot be substantiated by evidence. Only the fourth reason could apply to this case.

A claim is legally without merit only if there is no legal basis for recovery by the United States. In other words, if the United States were to sue on such a claim, the United States would be unsuccessful.

The Merits

The acceptance of a grant of federal funds that is subject to conditions which must be met by the grantee creates a valid contract between the United States and the grantee. 50 Comp. Gen. 470, 472 (1970). The terms of the "contract" are contained in the grant agreement and applicable statutes and regulations.

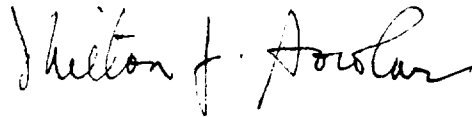
In this case, the grant agreement provides that "any excess costs" recovered from a defaulting contractor or its surety are to be prorated between SCS and the District in the same ratio as construction funds were contributed. There is no indication in the agreement that legal costs are to be deducted before prorating the amount recovered. Further,

^{1/} Under 4 C.F.R. § 104.1(b) an agency head can terminate a claim, regardless of the amount involved, and without need for Department of Justice concurrence, if the claim is plainly erroneous or "clearly" without legal merit. In referring to this exception to the \$20,000 limit, the "Supplementary Information" accompanying the publication of the Standards said, "[t]his exception is intended to apply only in cases of clear error. If there is room for reasonable disagreement, Justice Department concurrence should be sought." 49 Fed. Reg. 8895 (1984).

the grant agreement provides that the District is responsible for litigation needed to collect funds owed by the contractor.

Based on the grant agreement, the parties apparently intended that in the case of default the District would bear all costs of litigation, and that SCS would receive its prorated share of the total amount recovered. The fact that the legal fees actually incurred by the District in collecting the reprourement costs were greater than the parties might have anticipated does not alter the application of the terms of the agreement.

Therefore, there is a significant legal basis for SCS's claim and we cannot conclude that if the United States were to sue on this claim it would be unsuccessful. Collection action cannot be suspended or terminated. Since the SCS indicates that all administrative collection procedures have been exhausted, this matter must be promptly referred to the Department of Justice for litigation, using the Claims Collection Litigation Report. See 4 C.F.R. § 105.2(b).

A handwritten signature in cursive script, appearing to read "Shelton J. Fowler".

Acting Comptroller General
of the United States